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NO. 91-737

Supreme Court, U.S.
FILED
NOV 4 1991
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER - APPELLEE,

V.

RICKEY DEWAYNE PRINCE,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari and overrule the holding of the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that a confession is due to be held inadmissible under the "totality of the circumstances" test if an officer makes misleading statements to a defendant regarding incriminating evidence against him even though the defendant denied committed the offense at the time of the interrogation and only confessed three (3) days later after failing a voluntary polygraph test which was taken under non-coercive circumstances and after Miranda warnings had again been given?

2. Whether this Court should grant certiorari and overrule the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that an officer's statement that "capital murder

charge would not stay on you" was sufficient inducement to render the confession involuntary where the statement was an officer's opinion and not a promise of lenient treatment, where the confession was not given at the time of the interrogation but was given only after a three (3) day interval and only after the polygraph test had been failed?

3. Whether this Court should grant certiorari and overrule the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that the defendant's limited intellectual functioning was a factor to be considered in determining whether a statement or confession is voluntary where there was no showing that the defendant was mentally retarded or otherwise unable to understand his actions in giving the statement or confession?

PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals reversing Respondent's conviction is not yet reported, but is reproduced as Appendix A to this petition.[1]

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was rendered on August 16, 1991. This Court has jurisdiction under 28 U.S.C. §1257(a), as amended (by Public Law 100-352) on June 27, 1988.

Although the Alabama state court, in rendering the opinion in the instant case, cited only state authorities, it is clear that the state authorities themselves relied upon the United States Supreme Court's interpretation of the Fifth Amendment. For

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

example, the State Court relied upon Ex Parte McCary, 528 So.2d 1133 (Ala. 1988) to hold that an "affirmative misrepresentation" to a defendant makes the later statement involuntary. Ex Parte McCary relied upon Spano v. United States, 360 U.S. 315, 79 S.Ct. 1202, 3 1.Ed.2d 1265 (1959). The state court also relied upon Ex Parte Hill, 557 So.2d 838 (Ala. 1989), which in turn relied upon Spano, supra as well as Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). Under these circumstances, the United States Supreme Court has jurisdiction to consider the questions presented in this petition even though the State Court's opinion only relies upon State court authorities.

In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the court held that "[where] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any

possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so." 77 L.Ed.2d at 1214. The court also stated that it would not undertake review only if the state court decision clearly and expressly indicates that it is based upon "bona fide separate, adequate and independent [state]
grounds". Id at 1214. This holding of Michigan v. Long was recently re-affirmed in Coleman v. Thompson, 111 S.Ct. 2546 (1991).

There is no question that the State Court was applying federal constitutional standards when it decided the appeal in the instant case. Since the state court wrongly decided a substantial federal issue, this Court should accept jurisdiction to correct the state court's ruling.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V (in pertinent part)

...; nor shall [any person] be compelled in any criminal case to be a witness against himself....

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The defendant was indicted by the Grand Jury of Morgan County, Alabama for the crime of capital murder in violation of §13A-5-40, Code of Alabama (1975) as amended. Trial of his case began on December 27, 1989, and afterwards, a verdict of guilty was returned. The defendant was sentenced to life without parole upon the recommendation of the jury.

On February 1, 1991, the Alabama Court of Criminal Appeals, in a written opinion, reversed the conviction on the ground that the defendant's confession had been involuntarily given to the investigating officers because

the officers had given the defendant misleading information prior to the confession. That court denied the State's Application for Rehearing on May 31, 1991.

A Petition for Writ of Certiorari to the Alabama Supreme Court was filed on June 14, 1991, and the Writ was denied on August 16, 1991 and the State's Motion to Stay Judgement was denied on September 20, 1991.

B. STATEMENT OF THE FACTS

The defendant, Rickey Dewayne Prince, was charged with the capital offense of committing intentional murder during a 1984 robbery or attempted robbery at a Wahavo Service Station in Lacey Springs, Alabama. In February of 1988, Gerald Goodwin of the Morgan County Sheriff's Office re-opened an investigation into the shooting death because he had received some information that caused him to focus on the defendant [S.R. 45-46]. He picked up the defendant, who was already on

probation, advised defendant of his constitutional rights and had him to sign a waiver of his rights [S.R. 48, 49]. The defendant was interviewed by his Probation Officer and then by Officer Goodwin [S.R. 52]. Goodwin taped his interview [S.R. 52]. During the interview, the defendant, at first, denied being at the scene of the crime [S.R. 54]. Later during the interview, Officer Goodwin told the defendant that he had two eyewitnesses that saw him commit the crime [S.R. 85, 86]. The officer admitted during the suppression hearing that he did not have any eyewitness to the crime at that time [S.R. 86]. The officer also told the defendant that they had found the victim's billfold in a ditch and that the billfold had fingerprints on it [S.R. 87]. At that time of the interview, the billfold had not been sent to the lab and a later examination did not reveal any prints [S.R. 87]. The officer also told the defendant that "capital murder wouldn't stay on you" [S.R. 87, 88] and that

he would not charge him with capital murder [S.R. 87, 88]. Goodwin also told the defendant that this is "the only way you can be helped" [S.R. 90]. The officer later told the defendant that he could be charged with anything from manslaughter to capital murder and that the charge would depend upon the depth of his involvement [S.R. 84]. The defendant then stated that two other persons used his [defendant's] gun to kill the deceased [S.R. 52]. The defendant admitted his involvement, but denied committing the crime [S.R. 54]. The defendant gave several different versions, the final of which was taped [S.R. 54, 55]. The defendant was not kept in custody and he was allowed to leave the courthouse [S.R. 61, 62, 65]. The defendant asked to take a polygraph test because he had taken one before and passed it [S.R. 65]. A test was set up for him [S.R. 65].

Three days later, the defendant arrived at the Hartselle Police Department and took the test after being advised of his Miranda rights [S.R. 66, 106]. The defendant was then informed of the results of the test [S.R. 70]. The defendant continued to deny committing the crime but the officers indicated to him that they knew it was not the defendant, but the dope inside him that shot the victim [S.R. 112]. The defendant started crying and signed a statement admitted that he shot the victim [S.R. 70, 114].

The defendant called Roger Rinn, a private psychologist who testified that he had examined the defendant [SR-141-143]. Rinn interviewed the defendant while the defendant was still in jail, obtained a history, and interviewed his parents [SR-143, 144]. He found that the defendant had a history of academic underachievement, that he was marginal, that he in the past had been addicted to cocaine and alcohol, and had

problems with people [SR-145]. The defendant told him that he, along with Wayne and Gary Davidson, were shooting cocaine that night and that he drove Gary Davidson to Huntsville on his motorcycle where Davidson shot the attendant while they were getting gasoline [SR-145, 146]. The defendant told Rinn that he told his wife that Davidson had shot the attendant [SR-146]. The defendant also stated that he felt the polygraph came out good and that he was told that he failed the test [SR-146, 147]. The defendant stated that he was physically abused after the taking of the polygraph but later changed that story [SR-147]. The defendant stated that he was told that if he signed the statement, he would get out on bond, and that he was told that he was not charged with capital murder [SR-147]. The defendant denied the shooting, stating that he was frightened and that he signed the statement because he wanted to get out of jail [SR-147, 148]. Rinn testified that the

defendant had a verbal I.Q. of 74, a performance I.Q. of 89 and a full scale I.Q. of 78. This placed him in the range of borderline intelligence, not retardation [SR-150]. This placed him in the tenth percentile of the national population in verbal skills and 12th percentile in full scale I.Q. [SR-150, 151]. The psychologist concluded that it would have been difficult for the defendant to understand written documents [SR-158].

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF A CONFESSION SHOULD BE DEEMED INVOLUNTARY UNDER CIRCUMSTANCES WHERE AN OFFICER MAKES A STATEMENT TO A DEFENDANT MISCHARACTERIZING THE EVIDENCE AGAINST HIM BUT THE DEFENDANT DENIES COMMITTING THE OFFENSE AND CONFESSES ONLY AFTER BEING TOLD OF A FAILED POLYGRAPH TEST WHICH WAS TAKEN THREE DAYS AFTER THE MISLEADING STATEMENTS WERE MADE TO HIM.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held that before the State could introduce a confession by a defendant who is not represented by counsel, the Fifth Amendment required a showing that the defendant was advised of his constitutional rights and the he knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

In Illinois v. Perkins, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), the Court stated that "Miranda forbids coercion, not mere strategic

deception", and the Court stated that "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns". S.Ct. at 2397.

In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Court left unanswered the question of whether an officer's false statement about having found the defendant's fingerprints at the scene would be relevant to finding the confession to be invalid under Miranda where the confession was otherwise given under non-coercive circumstances and preceded by the required Miranda warnings.

In Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), the Court held that where the questioning was of short duration and the defendant was a mature individual of normal intelligence, the fact that a police officer misrepresented statements that a co-defendant had made is insufficient to make an otherwise voluntary

confession inadmissible. It must be acknowledged, however, that Frazier v. Cupp involved a conviction obtained prior to this Court's decision in Miranda, and thus the Court did not have occasion to determine if that confession would have withstood the application of Miranda.

In the instant case, the officer told the defendant that he had an eyewitness to the crime, namely one of the co-defendants and also told the defendant that he had fingerprints on the billfold, although the officer later admitted that he had not taken a statement from the co-defendant nor had they found any of the defendant's fingerprints on the billfold. Thus, this Court should grant certiorari to answer the question that was left unanswered in Oregon v. Mathiason and to determine if the rule of Frazier v. Cupp should be extended to post Miranda cases.

Furthermore, the misleading statements would not have rendered this confession involuntary because subsequent intervening

circumstances broke the "casual connection" between the statements and the confession so that the confession would have been "sufficiently an act of free will to purge the primary taint". Taylor v. Alabama, 457 U.S. 487, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). There was a three day interval between the officer's statements and the confession, the defendant voluntarily returned to the police station to take a polygraph test and confessed only after learning that he had failed the test, the Miranda warnings had been administered prior to taking the test, and the State established that the circumstances surrounding the confession were not coercive.

In the instant case, the Alabama Court of Criminal Appeals held that the "affirmative misrepresentation" caused the defendant to give statements connecting him to the offense and to later confess to the crime.

Additionally, that court held that the three day interval was an insufficient intervening period to negate the effects of the officer's actions. The Alabama Court of Criminal Appeals' opinion clearly conflicts with precedents of this Court concerning whether the giving of false or incomplete information is sufficient to invalidate a confession, e.g., Frazier v. Cupp, and with decisions of various federal courts which holds that a break in custody is relevant to determining if a subsequent confession is voluntary. e.g. United States v. Patino, 862 F.2d 128 (7th Cir. 1988), cert. denied, 109 S.Ct. 2072; Dunkin v. Thigpen, 854 F.2d 394 (11th Cir. 1988); United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987); McFadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987), citing Oregon v. Elstad, 470 U.S. 298 (1985); Agee v. White, 809 F.2d 1487 (11th Cir. 1987).

In Agee, supra, where the statement was given after an illegal arrest, the court held that where an initial statement which did not

admit any criminal activity and which did not increase the pressure to give the second incriminating statement, the second statement would not be held involuntary. The Court also noted that six days was sufficient to dissipate any coercive impact from the alleged illegal arrest.

The Alabama Court of Criminal Appeals' decision also conflicts with this Court's decision in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where the court held that the confession was not tainted and was admissible where the defendant had been released from custody on his own recognizance and voluntarily returned several days later to make his statement. Wong Sun should govern the facts of the instant case where the defendant voluntarily returned to take the polygraph test and then confessed upon being informed that he had failed it.

Because the Alabama courts has decided that this Court's precedents hold involuntary any confession obtained when the police uses

some forms of factual misrepresentation in order to obtain the confession and hold that a three day interval is insufficient to eradicate any effect of the misrepresentation, this Court should grant certiorari to decide whether said factual misrepresentations would void a confession where the misrepresentations were not made under coercive circumstances, where the defendant continued to deny committing the offense after the said misrepresentations were made, where the confession was given three days later after failing a polygraph test, and where the Miranda warnings had again been administered to the defendant prior to taking the test.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE FOLLOWING QUESTIONS CONCERNING INDUCEMENTS THAT ARE SUFFICIENT TO INVALIDATE A CONFESSION:

(A)

WHETHER AN OFFICER'S STATEMENT THAT "CAPITAL MURDER WON'T STAY ON YOU" IS TO BE CONSIDERED A SUFFICIENT INDUCEMENT TO INVALIDATE A CONFESSION WHERE THAT STATEMENT WAS MERELY AN OFFICER'S OPINION OF THE CHARGES THE DEFENDANT WILL FACE AND WHERE THE STATEMENT WAS NOT A PROMISE OF LENIENCY?

(B)

IF IT IS TO BE CONSIDERED AN INDUCEMENT TO CONFESS RATHER THAN AN OPINION, CAN THE OFFICER "CURE" THAT STATEMENT BY LATER TELLING THE DEFENDANT, IN THAT SAME INTERROGATION, THAT THE CHARGE COULD BE ANYTHING FROM CAPITAL MURDER TO MANSLAUGHTER?

(C)

EVEN IF THE OFFICER'S STATEMENT IS CONSTRUED TO BE AN INDUCEMENT, DID THE STATEMENT INVALIDATE THE CONFESSION WHERE THE DEFENDANT CONTINUALLY DENIED COMMITTING THE CRIME AND DID NOT CONFESS DURING THAT INTERROGATION?

(D)

IF THE STATEMENT IS CONSIDERED TO BE AN INDUCEMENT, WAS A THREE DAY INTERVAL BETWEEN THE OFFICER'S STATEMENT AND THE CONFESSION A SUFFICIENT AMOUNT OF TIME TO REMOVE ANY NEXUS BETWEEN THE STATEMENT AND THE CONFESSION ESPECIALLY SINCE THE CONFESSION WAS ONLY MADE AFTER THE DEFENDANT HAD FAILED A VOLUNTARY POLYGRAPH TEST WHICH HAD BEEN PRECEDED BY THE MIRANDA WARNINGS?

This Court has repeatedly affirmed that a confession, in order to be valid, must be obtained without the use of direct or indirect promises. Brahms v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.2d 568 (1897). Lower federal courts have consistently held that statements by officers that "you have nothing to worry about" or statements that "the prosecutor and the judge would be notified of the cooperation" do not contain implied promises of immunity or leniency. e.g. Agee v. White, 809 F.2d 1487 (11th Cir. 1987); United States v. Fraction, 795 F.2d 12 (3rd Cir. 1986), respectively. Implicit in the Alabama Court of Criminal Appeals' holding is that "capital murder won't stay you you" is

an implied promise of immunity and this holding conflicts with the holdings of those federal courts. The officer's statement was merely an expression of his opinion that the defendant would not be convicted of capital murder and does not constitute a promise, which is defined by Fraction, supra, as an "offer to perform or withhold some future action within the control of the promisor" and "a promise is not the same thing as a prediction about future events beyond the parties control", Id at 15. That the defendant would not be charged with a capital offense was a prediction, not a promise, because the officer did not have the ultimate authority to decide what charge the defendant would face and the officer so informed the defendant. Although, in other cases, the Alabama Courts have noted the difference between an expressed opinion by an officer and a promise, see Ex Parte Singleton, 465 So.2d 443 (Ala. 1985), the court ironically refused to recognize that difference in this case, and

the failure to do so implicates the Fifth Amendment since the state court was obviously applying federal constitutional law to void the defendant's confession.

Furthermore, even if the officer's statement was seen as a promise, this would not automatically invalidate the confession under Brahams. The Brahms test has not been interpreted as a per se proscriptions against all promises during interrogation, Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1988), but only against those that "overbear a defendant's will." Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976).

This Court should also decide on certiorari if an officer, who gives misleading statements about the charge a defendant would face, can "cure" that misstatement by correcting himself in that same interrogation. The officer in this case later told the defendant that the charge could be anything from "capital murder to manslaughter", clearly disspelling any notion the defendant may have

had that he would not face capital charges if he confessed.

Moreover, defendant did not confess at the interrogation when the statement was made by the officer and thus there is no basis for the Alabama Court of Criminal Appeals to conclude that the statement affected the decision to confess in any way. As suggested in Agee v. White, 809 F.2d at 1494, a repeated denial is a significant factor in determining whether the defendant perceived the statement as an implied promise of leniency. Moreover, the Agee court concluded that the more likely implication of such a statement is that the defendant would not be prosecuted if his version of the facts are true. The Alabama Court of Criminal Appeals apparently did not accord sufficient weight to the continued denials of the defendant, even in light of the officer's statement, when it made a determination on the voluntariness of the statement.

The three day interval between the officer's statement and the confession was sufficient time to remove any possible nexus between the officer's statement and the confession. In regards to this argument, Respondent adopts that portion of Argument I which contains a similar argument regarding the three day interval between the time defendant was given the mischaracterized evidence and the entry of the confession.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN APPELLATE COURT MAY CONSIDER A DEFENDANT'S LIMITED INTELLECTUAL FUNCTIONING AS A FACTOR IN DETERMINING WHETHER A STATEMENT OF CONFESSION IS INVOLUNTARY WHERE THERE IS NO EVIDENCE THAT THE DEFENDANT IS RETARDED OR OTHERWISE UNABLE TO UNDERSTAND HIS ACTIONS AND WHERE THERE WAS NO COERCIVE POLICE ACTIVITY USED TO OBTAIN THE STATEMENT OR CONFESSION.

The Alabama Court of Criminal Appeals found that under the "totality of the circumstances" the defendant's statements were involuntary. After noting that the officer

had made false statements to the defendant concerning the evidence against him and that the officer had told the defendant that "capital murder would not stay on him", the court held that the statements were involuntary because of the testimony that the defendant possessed limited intellectual functioning. The testimony indicated that the defendant had an I.Q. of 74, a Performance I.Q. of 89 and a Full Scale I.Q. of 78. The defendant was not considered mentally retarded by the medical expert called on the defendant's behalf.

The Alabama Court of Criminal Appeals holding that these statements were involuntary because of the limited intellectual functioning conflicts violently with Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), which held that a deficient mental state would not automatically invalidate a defendant's statement and that there must be evidence of "coercive police activity". Id at L.Ed.2d 484. There was no evidence of coercive policy activity in the interrogation

of the defendant, nor evidence of any other form of improper police conduct.

The Alabama Court of Criminal Appeals' holding also conflicts with the holding of various federal courts, especially the Eleventh Circuit Court of Appeals, which has held that an I.Q. level of 62 was not sufficient by itself to invalidate a confession in absence of improper police conduct. See Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988). The defendant's I.q. of 74 surely would have been held sufficient for him to give a voluntary statement under federal law.

CONCLUSION

This Court should grant certiorari and consider adopting the rule that, where an inducement to confess is given during the interview and the defendant does not confess and still vigoriously denies having committed the crime, the effect of the inducement or coercion is simply dissolved if there is a

break in custody and the defendant is allowed to leave. Some circuit courts have adopted a similar rule regarding claims under Edwards v. Arizona, 451 U.S. 447, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1984). For example, the Eleventh Circuit in Dunkin v. Thigpen, 854 F.2d 394 (1988) held that where a defendant makes a request for counsel, and is then released from custody, the police may subsequently initiate interrogations and obtain a valid confession from the defendant because the defendant would have had an adequate opportunity to obtain or contact his attorney. Id. at 397. In the instant case, since the defendant left the initial interview without confessing to the crime, any effect of the inducement or coercion should have dissipated during the three day break between interviews and the defendant's confession upon his voluntary return to take the polygraph test represented

a voluntary statement which was not induced by any coercion or promise of lenient treatment.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of October, 1991, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent, by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable John Mark McDaniel
Honorable William P. Burgess, Jr.
313 Franklin Street
Huntsville, Alabama 35801

I further certify I have served all parties required to be served.

_____

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APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

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APPENDIX A

[RELEASED: FEBRUARY 1, 1991]

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-89-614

Rickey Dewayne Prince

v.

State

Appeal from Morgan Circuit Court
(CC-88-551)

McMILLIAN, JUDGE

The appellant was convicted of the capital crime of intentional murder committed during a robbery or attempted robbery. Following a sentencing hearing, the jury recommended that the appellant be sentenced to life without parole, by a vote of 12 to 0. Thereafter, the trial court sentenced the appellant to life imprisonment without parole.

The appellant argues that the trial court improperly allowed a taped statement and a confession, as well as testimony concerning the statement and the confession, into evidence, because, he says, they were not voluntarily made. Specifically, he argues that his statement and confession were involuntary because, he says, he had a low mentality, he was emotionally distraught when he gave them, and the police used improper methods of coercion in obtaining them.

During the suppression hearing, the appellant presented the testimony of a psychologist who had examined the appellant; that witness testified that he determined that the appellant had a full scale intelligence quotient of 78, placing him in a range of borderline intelligence. He scored significantly higher on the performance part than on the verbal part of the test. The witness further testified that the appellant was "not a psychotic individual, and that there

was no evidence at all ... of any serious mental illness." He testified that the appellant's educational functioning was that of a third grader, a child seven or eight years old. He further stated that the M.M.P.I. test revealed the appellant to be someone "low in self-esteem," "prone to substance abuse," "trusting in others," and "a rather frightened individual in general."

> "It is well settled that the mere fact that a defendant is functionally illiterate or simple-minded will not vitiate the voluntariness of his confession. Cliff v. State, 518 So.2d 786 (Ala. Cr. App. 1987). The low mentality of a defendant should go to the weight and credibility of the confession rather than to its admissibility. Elrod v. State, 281 Ala. 331, 202 So.2d 539 (1967). A defendant's mental impairment, even if it exists, is merely one factor affecting the validity of his waiver of rights and the voluntariness of his confession. Whittle v. State, 518 So.2d 793 (Ala. Cr. App. 1987); Sasser v. State, 497 So.2d 1131 (Ala. Cr. App. 1986). See generally, Annot. 8 A.L.R. 4th 16 (1981)."

Lewis v. State, 535 So.2d 228, 235 (Ala. Cr. App. 1988).

Thus, the evidence presented by the appellant concerning his low mentality was only a matter to be considered in determining what weight or credibility should be given to the confession.

Although the appellant argues that he was emotionally distraught at the time he made his statement, we note that "'[m]ere emotionalism and confusion do not dictate a finding of mental incompetency or insanity.' Sullivan v. Alabama, 666 F.2d 478, 483 (11th Cir. 1982)." Murphy v. State, 462 So.2d 761, 762 (Ala. Cr. App. 1984).

The appellant argues that a police officer used certain coercive and deceptive activities to obtain his confession. Gerald Goodwin, of the Morgan County Sheriff's Department, began a reinvestigation into a shooting death that had occurred in 1984. Pursuant to some information he had received, he spoke to the appellant's probation officer. Thereafter, he picked up the appellant in order to take him to the probation officer, who

had indicated that he also wished to speak to the appellant. Officer Goodwin testified that he advised the appellant of his rights, and the appellant signed a waiver. The appellant was then interviewed by his probation officer and Officer Goodwin; the interview was taped. During the interview, the appellant gave several different versions of his involvement in the incident, eventually confessing that he was involved in the offense, but denying that he actually pulled the trigger or took the victim's wallet. Officer Goodwin wrote out a summary of the appellant's final version, read the statement to the appellant, and allowed him to read it. The appellant then signed the statement. The entire taped conversation with the appellant was thereafter transcribed. Three days later, the appellant was given a polygraph test. After being told the results of his test, the appellant gave Officer Goodwin a signed statement, admitting to shooting the victim once or twice.

When questioned on cross-examination concerning the first taped conversation with the appellant, Officer Goodwin admitted that during the course of that interview, he told the appellant that a capital murder charge would not "stay" on him; that he told the appellant that the police had identified fingerprints from the victim's billfold, which was not true; and that the police had spoken to two eyewitnesses to the offense, who stated that the appellant was there, which was also untrue. The appellant argues that because of this deliberate deception during the first interview, his first statement and subsequent confession were involuntary.

The following transpired during the cross-examination of Officer Goodwin:

> "Q: What else did you tell him [the appellant] that was not true?
>
> "A: I told him I had a witness.
>
> "Q: As a matter of fact, you told him immediately after the tape started running and immediately after you gave him his rights that you had two eyewitnesses, didn't you?

"A: Yes, sir.

"Q: Was your statement something to the effect that 'I've got two eyewitnesses to it that sawyou there'?

"A: Yes, sir.

"Q: That was not true, was it"

"A: That's correct.

"Q: As a matter of fact, that was entirely false, wasn't it?

"A: I had two witnesses but not eyewitnesses.

"Q: You didn't have any witness to the -- you didn't have any witness to the shooting of Billy Hough [the victim]?

"A: Just one.

"Q: Who was that?

"A: Co-defendant.

"Q: You hadn't interviewed him at that, had you?

"A: Not at that time.

"Q: You didn't know what Gary -- you are talking about Gary Wayne Davis, aren't you?

"A: Yes, sir.

"Q: You didn't know what Gary Wayne Davidson was going to say, did you?

"A: Not really.

"Q: You hadn't talked to him?

"A: No, sir.

"Q: So you didn't have any eyewitnesses. You said earlier you had one. You didn't have any eyewitnesses at all, did you?

"A: Not then, I didn't.

"Q: But you told Rickey you did?

"A: Yes, sir.

"Q: Did you tell him that you had fingerprints?

"A: I don't remember.

"Q: Mr. Goodwin, I'm going to refer to what is page eleven of the transcript that's been provided the court and ask you if you made this statement to Rickey or is this a true and accurate rendition of what you said: 'yeah, well, it was found off in the ditch. It was found two years ago, and there is fingerprints on it.'

"A: Yes, sir; I did.

"Q: But you didn't have anything with fingerprints on it, did you?

"A: I had sent the billfold to the lab. I didn't have the results. I sent it shortly after.

"Q: There have never been any fingerprints identified on any billfold, have they?

"A: They found nothing on anything in the billfold.

"Q: Now, did you ever tell him that he was not going to be charged with capital murder?

"A: I told him I was not going to charge him with capital murder. I didn't know what the grand jury would do.

"Q: Did you ever tell him that capital murder wouldn't stay on him?

"A: I think it was about his involvement in it.

"Q: I asked you, 'Did you ever tell him capital murder wouldn't stay on him?'

"A: Yes, sir; I said that.

"Q: That was the statement you made to him prior to his ever making any statement about being at the Wavaho station where Billy Hough got shot, wasn't it?

"A: Yes, sir.

"Q: I'm going to show you what appears at the very top of page three of the transcript before the court at this time. And I'll ask you did you say this: 'But capital murder won't stay on you, I know that.'?

"A: Yes, sir.

"Q: You made that statement to Mr. Prince before he had ever admitted being at the Wavaho station?

"A: Yes, sir.

"Q: But you knew at the time you made the statement to Rickey you were investigating what you consider to be a capital murder, weren't you; that's what you told us earlier?

"A: Yes, sir."

The record contains a transcribed version of the taped conversation between Officer Goodwin and the appellant. This transcript reveals that Officer Goodwin initially told the appellant that he had spoken to the two eyewitnesses who stated that they had seen the appellant at the scene of the offense. He further told the appellant that he had spoken to the two alleged accomplices and that they both indicated that the appellant committed the offense and that they wanted the appellant "to get hung on it." The appellant responded by indicating that the

other two committed the offense and took his gun; however, he began to reveal what transpired during the offense. Officer Goodwin responded by stating:

> "You were there though. I can tell by the way you are looking, you were there. I don't think you shot him. That's why I want, I told you it was serious, but there is a way we can work around it. You can't -- you are not going to get free of it. I'll tell you that. But capital murder won't stay on you. I know that. But I know you were there."

The appellant then admitted having been present at the scene of the offense, but denied taking the victim's wallet or shooting him. Officer Goodwin subsequently told the appellant that, depending on the nature of his involvement, he might be charged with capital murder. Officer Goodwin told the appellant that the victim's billfold was found previously and had fingerprints on it. The appellant responded by stating that none of the fingerprints could have been his, because he never touched the billfold. He stated, "Yeah, we pulled it out,"

but he denied ever having touched the billfold. The appellant then asked Officer Goodwin, "What all has Gary [the accomplice] told you?" Officer Goodwin responded that the accomplice was "trying to insinuate he didn't know anything about it" and that the appellant "was the one that went down there, did the man to get money to buy coke." The appellant then gave further details indicating that he was present, but that his accomplice committed the offense.

The appellant was allowed to leave, following his statement, but was asked to return three days later to take a polygraph test. The appellant returned as instructed and took the polygraph test; when told the results of the test, Officer Goodwin placed his hands on the appellant's shoulder and stated that he knew that the appellant had not committed the offense but that the "dope fiend" inside of him had done it. The appellant began crying and confessed to having committed

the offense. During the trial, the psychologist testified that an individual with the personality type of the appellant, who was told by law enforcement officers during an interview that capital murder would not "stay" on him, might act pursuant to such an inducement three days later.

Because of the circumstances surrounding the giving of both of the appellant's statements, we hold that these statements were involuntarily given and were inadmissible. Specifically, the statement made by the interrogating officer to the appellant that he "knew" that capital murder would not "stay" on him constituted an improper inducement or promise; and the false statements made by the officer concerning the eyewitnesses, the statements by the accomplices indicating that the appellant committed the offense, and the false fingerprint evidence constituted "affirmative misrepresentations" that caused the appellant's statement given immediately

thereafter connecting him to the offense to be involuntary. Moreover, because of the testimony concerning the appellant's limited intellectual functioning, we cannot conclude that the three-day interval was a sufficient intervening period to negate the effect of the officer's previous actions, especially where the polygraph test was taken pursuant to the police officers' instructions.

> "The law with regard to the admissibility of a confession is aptly stated in Eakes v. State, 387 So.2d 855 (Ala. Cr. App. 1978);
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> "'A confession is presumed to be involuntary. Before its admission into evidence there must be evidence addressed to the trial judge sufficient to rebut that presumption and a showing that the confession was made without influence of either hope or ... fear, unless the attending circumstances affirmatively disclose the voluntariness of the confession. Wallace v. State, 290 Ala. 201, 275 So.2d 634 (1973); Bush v. State, 282 Ala. 134, 209 So.2d 416 (1968). In order to be admissible a confession must be free and voluntary and cannot be the result of any direct or implied

promises, however slight. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963); Bell v. Alabama, 5 Cir., 367 F.2d 243, cert. denied, 386 U.S. 916, 87 S.Ct. 859, 17 L.Ed.2d 788 (1966); Wallace, supra. The question of whether a confession was obtained by coercion or improper inducement can be determined only by examination of all the attendant circumstances. Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); Wallace, supra. Each case must stand or fall on its own merits for the constitutional inquiry into the issue of voluntariness requires more than a mere "color-matching of cases." Beecher v. Alabama, 389 U.S. 35, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). The true test of determining whether extrajudicial confessions are voluntary is whether the defendant's will was overborne at the time he confessed and therefore not the product of a rational intellect and a free will. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Elliott v. State, 338 So.2d 483 (Ala. Cr. App. 1976).'

"Before a confession can be admitted, the trial court must be satisfied by a preponderance of the

> evidence that it was voluntarily made. This finding will not be disturbed on appeal, unless it is evident that the determination was palpably contrary to the weight of the evidence. Ex parte Singleton, 465 So.2d 443 (Ala. 1985)."

Ex parte McCary, 528 So.2d 1133, 1134 (Ala. 1988).

In Ex parte Johnson, 522 So.2d 234 (Ala. 1988), the Alabama Supreme Court addressed a situation in which a defendant was told during an interview by a Tennessee state trooper, that he was being asked questions concerning his involvement in an offense which occurred in Alabama, "strictly" in order to investigate a traffic accident in Tennessee and that the defendant's responses would not be used against him in any other criminal proceeding. Thereafter, the information was passed on to the Alabama authorities and was used to secure the appellant's convictions as to that offense. The Alabama Supreme Court, pursuant to a totality-of-the-circumstances analysis, determined that, "[f]rom our examination of the attendant circumstances,

we find ample evidence that [the defendant's] statement was deceptively induced." Id. at 237.

In Ex parte Weeks, 531 So.2d 643 (Ala. 1988), the Alabama Supreme Court determined that a statement made by an interrogating officer to the defendant that the officer "wanted his [the defendant's] cooperation in this matter" and that if the defendant confessed to his role on the burglary the officer "would make it known to the district attorney," was held to be an improper offer to elicit the inculpatory statement. In holding that this improper inducement presented a finding of voluntariness, the Court cited Womack v. State, 281 Ala. 499, 205 So.2d 579 (1967), stating:

> "Womack was a murder case in which the defendant was told it would 'go lighter' on him if he talked. 281 Ala. at 506, 205 So.2d at 585. In reversing his conviction, this Court held that the sheriff's inducement gave the defendant a 'real hope for lighter punishment' and therefore made his

admission involuntary. See also Edwardson v. State, 255 Ala. 246, 51 So.2d 233 (1951); Kelly v. State, 72 Ala. 244 (1882); Redd v. State, 69 Ala. 255 (1881). As this Court stated in Womack:

> "'Any words spoken in the hearing of the prisoner which may, in their nature, generate such fear or hope, render it not only proper but necessary that confessions made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away and the mind of the prisoner made as free from bias or intimidation as if no attempt had ever been made to obtain such confessions.'
>
> Owen v. State, 78 Ala. 425, 428 (1885). See also Ex parte Callahan, 471 So.2d 463, 464 (Ala. 1985)."

Id. at 644.

In the present case, the officer's statement that things could be worked out and that he knew that a capital murder charge would not "stay" on the appellant, by its nature, could have generated such a hope in the appellant that he may have been improperly

induced to make his statement. The officer did subsequently state that the appellant could be charged with capital murder; nevertheless, because of the other attendant circumstances, including the appellant's limited mental capacity,[1] we cannot conclude that all trace of hope was fully withdrawn or explained away from the appellant's mind.

In Ex parte Hill, 557 So.2d 838 (Ala. 1989), the Alabama Supreme Court concluded that the admission of the defendant's statement, although not a confession, was improper because it resulted from trickery or deception by the police. In Ex parte Hill, supra, during the course of interrogating the defendant, an officer told the defendant that he had a statement from a witness who indicated that he had seen someone dragging a body into the laundromat early on the morning

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[1]Officer Goodwin testified that he remembered that he had read the appellant his Miranda rights, because he did not believe that the appellant could read.

in question and that the defendant's fingerprints were found on the victim's neck. The Court noted that "[a]t some time after being confronted with this fictional evidence, [the defendant] made a statement to the police." Furthermore, the defendant's statement was incriminating, but he did not confess to the murder; in fact, he continued to insist that the victim was still alive when he last saw her. Id. at 840. The Court held that although the defendant's statement was not a confession, it was an inculpatory statement directly relating to the facts or circumstances of the crime and connecting the defendant thereto. Id. In determining that the defendant's statement was involuntary, the Alabama Supreme Court noted that certain forms of psychological manipulation, such as offers of rewards, immunity, or benefits, had been held unconstitutional; however, "more subtle forms of psychological manipulation, such as trickery or deception by the police, have not

been considered sufficiently coercive, standing alone, to render a confession or incriminating statement involuntary." Id. at 841. "Instead, the trial judge must examine the totality of the circumstances surrounding the statement to determine its voluntariness." Id. The Court concluded:

> "[T]his Court is led to the conclusion that [the defendant's] will was overborne at the time he made the statement and ... the statement was therefore not the produce of a rational intellect and a free will. Instead, the statement was the result, in large part, of a deliberate deception perpetrated upon a person of weak intellect who was emotionally distraught. The important factors in our determination are the evidence of [the defendant's] borderline mental retardation, his schizophrenic personality or schizoid personality disorder, the evidence of possible brain damage, and [the defendant's] emotional state at the time of the interrogation, coupled with the police officers' deception. This Court finds the use of such blatant deceptions by the police to be at odds with our concept of due process of law, and especially repugnant when used against suspects of diminished intellectual ability."

Id. at 842.[2]

Similarly, in Ex parte McCary, 528 So.2d 1133 (Ala. 1988), the Alabama Supreme Court determined that "an affirmative misrepresentation" made to the defendant[3] resulted in a violation of the defendant's right to due process and, thus, that the

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[2]Cf. Cleckler v. State, [Ms. 5 Div. 581, Kune 29, 1990] ___ So.2d ___ (Ala. Cr. App. 1990) (wherein this court held that an officer's comment to the defendant that the police found only one set of footprints was not so misleading as to warrant reversal; the statement was based on the fact that the evidence showed "the police found only one clearly identifiable print and some other smudged prints. The testimony at trial indicated that all the prints were caused by a shoe with the same pattern. Thus, it was not unreasonable for the investigating officers to conclude that the crime was perpetrated by a sole actor."). Cf. also Gilder v. State, 542 So.2d 1306, 1308 (Ala. Cr. App. 1988).

[3]In McCary v. State, a chief deputy told the defendant that his accomplice had been killed, although the official was well aware that the accomplice was not dead, the implication of the official's misrepresentation being that the defendant could be charged with the murder of the accomplice.

defendant's statement should have been held inadmissible as involuntary. After being told of the false information, the defendant in McCary denied the killing, "but apparently confessed at some point during the interrogation after the misrepresentation had been made." Id. at 1134. The Alabama Supreme Court quoted Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 1203, 3 L.Ed.2d 1265 (1959), stating, "'We are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.'" Id. at 1135.

Therefore, based on the above cited authority and in light of the circumstances attending the appellant's statements, we conclude that the State's evidence was not sufficient to rebut the presumption of involuntariness. Therefore, the conviction

is due to be reversed and the cause remanded to the trial court for a new trial.

REVERSED AND REMANDED.

All judges concur.

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